The Solicitors' Journal

Vol. 98 July 3, 1954 No. 27

CURRENT TOPICS

Nuisance from Decibels

WITH such a pleasing name decibels ought to be good things, but during the past week or two it has been re-discovered that in the wrong quantity and in the wrong place they can be "like sweet bells jangled, out of tune and harsh." The variety of opinions in letters and newspaper articles has shown a change in the direction of tolerance or insensitivity from the days of the bitter pre-war anti-noise campaigns. There appear however to be still some who feel deeply enough to indulge in old-fashioned invective, like Mr. LESLIE RUSSELL'S "intolerably magnified droning of innumerable bees" of and concerning helicopters flying low over County Hall (*The Times*, 21st June). Others, preferring the appeal to pure reason, listed law courts and council chambers among the public buildings put out of action by noise. The noises, however, that prevent judges from hearing or thinking are usually ground traffic noises, and shouting in the immediate vicinity, although in at least one recent case an assize judge had to stop because of jet planes screaming. The question that lawyers may ask is, if writers to the Press, amongst whom judges are nowadays numbered, can differ so widely about whether helicopter noises are a nuisance, with what confidence can anyone advise a client on prospects in a nuisance action based on noise? Formerly, as the law reports testify, it was church bells and the piano next door that provided lawyers with their costs, and horseless carriages, railways and motor buses provided anti-noise propagandists with their pabulum. Now, with pneumatic drills operating in the Temple itself, judges may well hesitate before deciding that a noise interferes with the comfortable occupation of property, not according to fanciful notions of over-sensitive persons but according to the plain and sober standards prevalent among the English people. We ordinary sober people seem to be able to put up with anything nowadays. Shall we be driven to setting up a decibel standard for measuring nuisance? Apparently, judging from the divergent results of recent measurements, even that would be unsatisfactory.

A New Question in Lottery Law

THE interest now being shown by the members of police forces in various parts of the country in sweepstakes, "pools" and similar competitions run locally or by clubs is a special reason for solicitors, who may be called upon to advise the promoters of such schemes, to take note of the conviction (shortly reported in *The Times*, 23rd June) of two members of the Gloucester City Association Football Club Supporters' Club on charges of selling tickets in the club's shilling-a-week lottery, contrary to s. 22 of the Betting and Lotteries Act, 1934. The printers of the tickets were also summoned and convicted. The magistrates agreed to state a case for the High Court, whose decision, we hope, will be fully reported, for the question raised appears to be an important one. Judging by the report, the issue was whether a club running a regular weekly lottery producing an income of as much as £700 per week, of which it received £170 and distributed in

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prizes £530, could claim the protection of s. 24 of the Act, under which "private lotteries," as defined, are exempt on certain conditions from the statute's general prohibition of lotteries and prize competitions.

Coroners' Courts

AN inquest in which a driver of a car rightly refused to give evidence, because he had been served with notice of intended prosecution by the police, but in which the jury insisted on returning a verdict of manslaughter against him, was the subject of a criticism of coroners' inquests generally in a paragraph in the *Observer* of 20th June. The writer stated that the accused had been found guilty although he had yet to be tried, and asked why the Wright Committee's recommendations in 1936 that coroners should no longer have power to commit on a charge of murder, manslaughter or infanticide had not been adopted. Mr. W. B. PURCHASE, Coroner for the Northern District in the County of London, replying in a letter to the *Observer* of 27th June, wrote that the process of committal for trial by a coroner's jury is comparable to a committal by examining justices. The use of the word "guilty" in this case simply involves an accusation. The use of a coroner's jury, according to Mr. Purchase, is abundantly shown by the fact that magistrates occasionally refuse to commit, and in such cases it is open to a coroner's jury to commit. To this the Legal Correspondent of the *Observer* replied that "a growing number of the legal profession, including distinguished members of the Bench, do not feel that coroners' courts perform nearly so useful a function as Mr. Purchase obviously believes."

Congestion in the Metropolitan Magistrates' Courts

THE relief of the heavy congestion of work at the Metropolitan magistrates' courts has been a crying need for so long that it seems as if those responsible have gone to sleep on the matter. Only a few months ago a correspondence in the Press indicated the strong feelings of those members of the public who have been compelled to waste their time at these courts waiting too long for their cases to come on. There is no doubt what magistrates think about it. "It is most unfortunate," Mr. A. H. G. CRASKE said at West London on 24th June, "that cases have to be remanded several times. We cannot help it, for we do our best." He said that there were too few courts and too few magistrates. The West London Court, he added, like most of the courts, but more so than some, is grossly overloaded with work. There is, of course, a remedy which there is reason to believe would be welcomed by all concerned, including the public. This is to call in the lay justices to deal with more and more of the merely routine work of the courts. This has often been suggested, but so far as is known next to nothing has been done about it.

"Don't Be Scared of Lawyers!"

SINCE we asked recently: "Why should not The Law Society issue pamphlets indicating how solicitors may save their clients from unnecessary expenditure?" our attention has been drawn to an article under the above heading printed in the American periodical *This Week* explaining how the American Bar Association has conducted a nation-wide drive to popularise reference to legal advisers. The main difficulty in the United States appears to be a fear in the lay public of incurring heavy legal fees—this is countered by publicising details of usual costs for, say, a simple will, a general consultation, preparation of leases, income-tax returns, attendance at court, etc. Examples are printed showing the sort of situation in which expert legal advice is a great economy. This is an era of "goodwill advertising" and the legal profession cannot afford any longer to close its eyes to the implications of that fact. The President of The Law Society has indeed said that we should advertise, and since we cannot do this individually (even if we wanted to) let us "sell" the profession as a whole.

Law on the Wing

THE Faculty of Law at Southampton University is nothing if not progressively minded. Its Dean, Mr. S. N. GRANT-BAILEY, whose refreshing approach to the teaching of law once before gave us occasion for comment (96 SOL. J. 352), has now suggested the establishment of a degree course in the law relating to air transport. He was speaking at the inaugural dinner of the University Law Club, and his proposal was supported by Mr. Justice WILLMER, who, referring to the position of Southampton as first and foremost a great port, reminded his hearers that there was also at the University an opportunity to build up a great school of maritime law. It may be, as the speaker suggested, that the sea has something to teach the air in the development of a field of law. Indeed, the Dean is reported to have said that air law was not yet created, a statement which will surprise those of our readers who have "McNair" or "Shawcross and Beaumont" on their shelves and have perused the international conventions on the subject. No doubt the subject has to be built up on existing branches of the law, as Mr. Grant-Bailey says. For our part we would remark that one such branch which could safely be ignored in settling the curriculum of the new course seems to be that dealing with nuisance by noise. That topic appears now to be largely overlaid by statutory order, so far as aircraft are concerned, for by the Air Navigation (Seventh Amendment) Order, 1954, it is no longer possible to take legal action against aircraft manufacturers for alleged nuisance caused by noise and vibration at their airfields. Previously this protection had been confined to Government and licensed airfields. Fortunately there is as yet no prohibition against writing to *The Times*.

Safe Careers

THE headmaster of a public school is reported as saying that if such schools are to continue to provide the nation's leaders in spiritual and industrial life, then the boys at the schools must be adventurous in their choice of career. He deplored the modern tendency to choose safe and conventional careers rather than adventurous ones. "To choose a job at the age of twenty because it leads to a pension is like choosing a town to live in because it has a good cemetery," he said. We would echo this sentiment wholeheartedly. It may be thought to be aimed largely at those whose best answer to the career problem is to "try for the civil service" on grounds far removed from any desire to serve the community. But we understand that in fact the headmaster (though this is not reported in the Press) implied that he had in mind the law and accountancy as examples of safe and conventional callings. We think we could disabuse him of any such idea if he could spare the necessary time from the excitements of his study. Certainly the reference to pensions could hardly be less apposite than to the case of worthwhile careers in the law. And that our profession does offer to the best type of entrant worthwhile careers, equally fruitful in opportunity for useful and constructive service as are those chosen for special commendation by the headmaster—the church, teaching and industry—not all the complexities of present-day legislation, nor all the economic hazards faced by the self-employed classes, will deter us, unadventurous sluggards that we are, from asserting.

THE COMMENCEMENT OF THE LIMITATION PERIOD IN NEGLIGENCE CASES

"My Lords," said Lord Bramwell, beginning his speech in *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127, at p. 144, "laying down general propositions is attended with the same danger as giving definitions. Some necessary qualification or exception is generally omitted." His lordship, nevertheless, "with these dangers before my eyes," ventured on some abstract propositions. The case was concerned with the question when, in point of time, there could be said to be a complete cause of action so that the Statute of Limitations began to run against the potential plaintiff. The generalisations essayed by Lord Bramwell, as slightly extended and adapted for our present purpose, were three:

(1) When a thing wrongful in itself is done to a man, *in itself a cause of action*, he must sue, if at all, once and for all. It would follow that in the case of a breach of contract or of a tort actionable *per se* the statute runs from the wrongful act.

(2) Where the wrong is not actionable in itself, but is at the time only an *injuria sine damnum*, an action should lie every time that damage subsequently accrues from the wrongful act. Thus, *A* utters to *C* words concerning *B* which are not actionable in themselves. *C* later and in consequence refuses to contract with *B*. *B* then, but not before, has a cause of action against *A*, and the appropriate limitation period begins.

(3) Where, as in the case before the House, the act in question is not in itself wrongful at all, but gives rise subsequently to damage which is actionable, there is no cause of action until the damage occurs. The particular instance was an excavation made by the defendants under the plaintiff's land in 1868. Two subsidences resulted, one in 1868 for which the plaintiff had received satisfaction, and one in 1882; and to the plaintiff's action in respect of damage sustained on the second occasion the defendants pleaded the statute. A majority of the House following *Backhouse* v. *Bonomi* (1861), 9 H.L. Cas. 503, held that in these circumstances the cause of action in regard to the second subsidence did not accrue until that subsidence occurred, notwithstanding that the defendants' responsibility for it was referable to their actions fourteen years previously. The limitation plea failed.

Of particular relevance to the remainder of this article is the second of Lord Bramwell's generalisations, for it may appear at first sight to be in conflict with the decision recently reported at [1954] 1 All E.R. 896 of Streatfeild, J., in *Archer* v. *Catton & Co., Ltd.* [1954] 1 W.L.R. 775; *ante*, p. 337. That was an action for damages for negligence and breach of statutory duty brought by a furnace worker against his former employers. Now in regard to both these heads of claim actual damage is an essential ingredient. In other words, they fall within Lord Bramwell's second proposition. Yet the All England Reports headnote of the recent case, citing a passage from Dr. Charlesworth's *Law of Negligence*, which the learned judge seems to have adopted, avers as follows: "In an action of negligence, the cause of action accrues at the time of the negligence, because it is then that the damage is caused, even though its consequences may not be apparent until later." As will appear, we do not presume to quarrel with the decision in *Archer* v. *Catton & Co., Ltd.*, but we venture to suggest, with the utmost respect, that the sentence from Dr. Charlesworth's work on which it purports to be founded (always assuming that *tortious* negligence is referred to) contains a fallacy.

If, indeed, in the particular circumstances of a case the damage *is* caused at the same time as the act of negligence or the negligent omission takes place, then the cause of action is at once complete, though not on account of the act or omission considered alone, but because of the immediate occurrence of the damage. What we suggest is that it is too sweeping an assertion to say that the damage must always be considered as coincident in time with the negligent act. Suppose, for instance, that I am a manufacturer of ginger beer which I sell in opaque bottles to a retailer. A bottle remains for months on the retailer's shelves and is then bought by a customer, and after further delay is consumed as far down as the inevitable snail. My act of negligence precedes the damage by a considerable period. If the bottle had been thrown away unopened by the ultimate purchaser for some reason unconnected with the presence of the foreign body he would have had no claim. Neither would I have been liable in any way if the bottle had been accidentally smashed, even though the customer had then discovered for himself its grisly secret. The damage is the gist of the action, and it is on the occurrence of the damage that the cause of action accrues and the statute begins to run. The position is the same as in Lord Bramwell's example of the slander by words not actionable *per se*, or in the case of torts like nuisance or seduction. Time runs against a parent who can don the fictitious mantle of master of his daughter's services, not from the time she is seduced, but from the time when he is first deprived of her services thereby—an example given in Preston and Newsom on Limitation of Actions, 3rd ed., p. 49, and authenticated by inference from *Robert Mary's* case (1612), 9 Co. Rep. 111*b*.

Streatfeild, J., accepted the statement quoted above from Dr. Charlesworth on the strength of an old authority, *Howell* v. *Young* (1826), 5 B. & C. 259. This was an action for negligence against an attorney who had advised the plaintiff that certain mortgages were sufficient security for an advance, whereas they were not. The interest on the advance was regularly paid for more than six years, but then fell into arrear, whereupon it transpired that the security was insufficient. Nowadays, we should regard an action for negligence against a solicitor as being grounded not in tort but in contract (*Bailey* v. *Bullock* [1950] 2 All E.R. 1167), with the consequence that a cause of action arises as soon as the contract is broken. The effect, at all events, was not dissimilar in 1826, for the court held that "the misconduct of the defendant was the gist of the action. If the allegation of special damage had been wholly omitted the plaintiff would have been entitled to a verdict for nominal damages." In other words, this was a case where the breach of duty was itself the cause of action, unlike the modern action of negligence as it has since developed. Or one could say that having acquired his inadequate security the plaintiff had suffered actual damage long before he realised it.

This last thought really gives the clue to what we submit in all humility is the true basis of the decision in the recent case. Mr. Archer had been employed by the defendants between 1923 and 1940 on work which involved his being in a confined space in which a great deal of fine dust was cast off. From 1940 to 1943 he did other work. In October, 1943, he found for the first time that he was suffering from a condition of the chest allegedly caused by the dust collected in his lungs up to 1940, and had to give up work. He issued his writ in September, 1949. Was his claim statute-barred?

His counsel argued that a cause of action in negligence cannot be complete until there is, first of all, negligence, and until the plaintiff knows or should know that he has suffered injury in consequence of it. This is the contention that the learned judge, rightly we submit, rejected. The knowledge or discovery of the damage is irrelevant unless it is concealed by fraud (*not* mistake: see *Phillips-Higgins* v. *Harper* [1954] 1 Q.B. 411). We may note that in the *Darley Main* case there was no question of delay in realising that the subsidence had caused damage; the second subsidence was delayed as a matter of physical fact. Conversely, the argument which the learned judge rejected in *Archer* v. *Catton* was not that the cause of action needed to await the occurrence of actual damage before it was complete. That proposition would have been true, but of no avail in the circumstances because the damage, i.e., the presence of dust in the plaintiff's lungs, happened to be coincident with the act or acts of negligence alleged.

It happened, we say, to coincide in this case. But we hope we have shown that this need not always be so, and that the statement which opens the headnote we have quoted must be read as qualified accordingly. J. F. J.

CORONERS AND CREMATION CASES

NOTES FOR THE GENERAL PRACTITIONER

THERE is no doubt that the practice of disposing of the bodies of deceased persons by cremation is rapidly increasing. Testators frequently instruct their solicitors to insert some such clause as "I wish to be cremated and my ashes deposited, etc." in their wills and, realising that wills may not come to light for some time after death, they even more often give directions for cremation to their near relatives.

In spite of such wishes being expressed or directions given, executors are not bound by them (*Williams* v. *Williams* (1882), 20 Ch. D. 659). On the other hand, reg. 4 of the Cremation Regulations, 1930, made in pursuance of the Cremation Act, 1902, renders it unlawful to cremate the remains of any person who is known to have left a written direction to the contrary.

Coroners are only concerned with cases reported to them in which there is reasonable ground for suspicion that a person (*a*) has died a violent or unnatural death, (*b*) has died from an unknown cause, or (*c*) has died in such other circumstances as necessitate an inquest being held, as, for instance, in prison or from industrial poisoning or disease. The report to the coroner should, to avoid delay, always state whether or not cremation is desired. In nearly all cases reported in which cremation is asked for the coroner orders a *post-mortem* examination, for the obvious reason that burning the body prevents investigation of the cause of death. However, there are a few deaths of which reports are received in which a doctor who has been in attendance on the deceased is prepared to give a certificate of the cause of death. In such cases the coroner, if he is satisfied, sends to the registrar of deaths notification on pink form "A" that the case has been reported to him and he does not consider it necessary to hold an inquest, and sets out what the probable cause of death is. To enable a medical practitioner to give a certificate without the consent of the coroner he must have been in attendance on the deceased "during his last illness," which words have been defined as "personal attendance upon at least two occasions, one of which should be within eight days of death." The registrar of deaths has a special duty to report to the coroner a death when the certifying practitioner has not seen the deceased either after death or within fourteen days before death; it is not necessary that he should have done both. If the coroner issues pink form "A" his interest in the case ceases and he takes no further part in the procedure under the Cremation Act and Regulations.

In the rest of the cases reported to him in which cremation is required the coroner orders a *post-mortem* examination, at which any relative of the deceased who has given notice of his desire to attend or be represented may attend and, when practicable, will be given notice of its time and place (Coroners Rules, 1953, r. 4 (2) (*a*)).

If the report of the *post-mortem* examination shows that the death is a natural one, that is, not attributable to violence, suicide or accident, or industrial poisoning or disease—for it is recommended that inquests should be held in all cases of deaths from industrial diseases though not to be categorised as accident or misadventure—the coroner, if satisfied, sends to the registrar of deaths pink form "B" setting out the cause of death disclosed by the *post-mortem* report, and stating that he is satisfied that an inquest is unnecessary. Simultaneously he issues cremation form "E" which certifies that an inquest has been held if one has taken place, of which more anon, or that a *post-mortem* examination has been made, sets out the cause of death and states that no circumstances exist which could render necessary any further examination of the remains or any analysis of any part of the body. No fee is payable to the coroner for form "E"—which is alternative to a burial order—for the delivery of which he should assume no responsibility; it should be taken up from him by the party interested.

If the coroner decides that an inquest should be held, form "E" may not be issued until a verdict has been given except in the cases mentioned in reg. 8 (*d*) of the Cremation Regulations, 1930, namely, those in which death occurs in connection with an industrial, railway, flying or road accident. In such cases the coroner may, after hearing the necessary medical evidence, adjourn the inquest with a view to the investigation of the causes of the accident and, without waiting for the termination of the inquest, issue form "E."

Where a charge of murder, manslaughter or infanticide results from the inquest, the final hearing of which may not be determined for, possibly, months, destruction of the remains by burning may be undesirable and cremation may therefore become a practical impossibility if the remains have to be preserved until after the trial is concluded. In these circumstances burial might be permitted, as it would always be possible to exhume the body for further examination, if required.

One final word on the position of the coroner in regard to cremation cases. His duties call for the exercise of considerable tact and discretion. The Legislature recognises his powers by enacting in s. 10 of the Cremation Act, 1902, that nothing in the Act shall interfere with the jurisdiction of any coroner. He has to be reasonably suspicious of every application for cremation without injuring the feelings of sorrowing relatives and friends who, on their part, should bear in mind that a *post-mortem* examination, for which they are not called upon to pay, as they would be for cremation certificate "C"—the medical certificate to be obtained in cases not coming before the coroner—may clear everyone from any stigma and establish the cause of death with certainty.

P. P. P.

A Conveyancer's Diary

INHERITANCE ACT: EVIDENCE OF WIDOWHOOD

IT is rather late in the day to comment on a decision which was first reported as long ago as last November, but in the case of *Re Watkins* [1953] 1 W.L.R. 1323; 97 SOL. J. 762, there is a reason for this delay. The circumstances were such that, by their nature, fact and law were considerably intermixed, and to extract the principle of the case which will be useful in dealing with other similar cases it would have been very useful to have had a note of the arguments to which to refer the reader, additional to that which appears in the judgment. I had hoped, therefore, that the decision would at some time be more fully reported, especially as the point which the case raised must be a not uncommon one in the administration of this Act. But that hope has proved to be ill founded, and one must do one's best with the decision as it was originally reported.

The question which came before the court may be summarised as follows: *A* marries *B* as her first husband, and *B* deserts *A*. After a considerable period of time, during which *A* hears nothing of *B*, *A* marries *C*, describing herself for the purposes of this marriage, or ceremony of marriage, as a widow. On *C's* death *A* claims maintenance under the Act, and it is objected by those who are entitled to *C's* estate that *A* is not entitled to such maintenance because she cannot show affirmatively that she was a widow at the time of her marriage to *C*, and therefore that she is not the widow of *C*, as the Act requires, at the time of the application. What is the relevance of the length of time which elapses between the disappearance of *A's* first husband and her marriage to *C*?

This is a point which was mentioned, but not discussed, by Roxburgh, J., in his judgment in *Re Peete* [1952] 2 T.L.R. 383. (An article on that decision appeared in this Diary shortly after it was reported: see 96 SOL. J. 708.) In that case the plaintiff went through a ceremony of marriage in 1919 with the testator upon whose estate she was claiming. In her evidence in support of her application she said that her first husband, then employed at a factory making munitions, had been killed in an explosion there on the 2nd April, 1916, and that she (the plaintiff) had heard of his death about a week thereafter when she met a sister of his. Much of the discussion in that case was concerned with the amount of weight to be given to a ceremony of marriage and a certificate of marriage issued by a registrar, and the principle which the learned judge applied in deciding the case was one which had been enunciated in *Tweney* v. *Tweney* [1946] P. 180, that a marriage celebrated with all proper formalities, followed by cohabitation, should be presumed a valid marriage until some evidence was adduced which would lead the court to believe the contrary. Enough evidence was, in fact, adduced in *Re Peete* to lead the court to doubt whether the plaintiff, when she went through a ceremony of marriage with the testator in 1919, was a widow, and Roxburgh, J., therefore held that she was not entitled to claim on the footing on which she had claimed. Roxburgh, J., then went on to make the following observation ([1952] 2 T.L.R. at p. 388): "Having reached the conclusion that she has not proved that [the first husband] died in 1916, it occurred to me that, if I was not prepared to accept the evidence of what the sister of the first husband had told her, having heard it from some unknown person, then she might be able to set up a case that the husband had disappeared over a long period in circumstances under which she was entitled to presume, or would be entitled to presume, that he was dead at the time of the marriage." In fact, it turned out to be impossible for the plaintiff, owing to the defective state of her memory, to set up an alternative case on those lines, and her claim was therefore dismissed.

Up to a point, the circumstances in *Re Watkins* were very similar. The plaintiff married one W. E. in 1913. Cohabitation ceased shortly after the war of 1914-19, during which W. E. served in the army, and in 1921 he deserted the plaintiff for another woman. The plaintiff last saw W. E. in 1922, after which, so far as the plaintiff was concerned, he disappeared. Although she kept in touch with members of his family for some years after his disappearance, she never heard anything of him until 1942, when a cousin of his told her that he had died in Bath in that year. The plaintiff did not make any search for or inquiries about W. E. before her second marriage, but when that marriage was proposed she obtained a certificate of the death in Bath on the 30th October, 1942, of one E. W. E., whom she assumed to be her first husband. In 1948 the plaintiff married the testator, and after his death in 1951 she took out a summons for maintenance under the Act.

The evidence which she first filed in support of this application was simply this: that she was a widow of the testator, having married him in 1948, and that she was a widow at the time of such marriage, her first husband having disappeared in or about 1923. That, as the learned judge said, was a plain statement which in an ordinary case would have been sufficient to give the court jurisdiction to make an award of maintenance in her favour; but one of the defendants obtained a copy of the death certificate of the man who died in Bath in 1942, and having compared the description it contained of the dead man with the description of the plaintiff's first husband in her marriage certificate, pointed out certain discrepancies between the two which forced the plaintiff to concede that she had had no real grounds for supposing that the man who died in Bath was her first husband. The basis on which the plaintiff had made her application thus collapsed.

So far the facts in the two cases were for all practical purposes identical, but from this point onwards they diverged. Apart from the defective state of the plaintiff's memory in *Re Peete*, the interval of time between the date on which the plaintiff relied as the date of her first husband's death and the date of her marriage with her second husband was only three years, whereas in *Re Watkins* the period preceding the marriage with the second husband during which the plaintiff had neither seen nor (with the exception of the incident in 1942 relating to the man who died in Bath) heard of her first husband was well over twenty years. In these circumstances the plaintiff in *Re Watkins* was able to do what the plaintiff in *Re Peete* had not been able to do, viz., in the words of Roxburgh, J., in the last-named case, "set up a case that the [first] husband had disappeared over a long period in circumstances in which she would be entitled to presume that he was dead at the time of the marriage" with the second husband.

The plaintiff supported the case which she put forward in this way with authority, to which Harman, J., referred in some detail in his judgment. First, there were certain statutes which, as a matter of convenience, dealt with the consequences, or some of the consequences, of absence for a period. The well-known statute of James I provided that when a spouse has not been heard of for more than seven

years a man or woman cannot be convicted of bigamy for going through a second ceremony of marriage even if the first spouse be then living. A less well-known statute of Charles II provided that where a lease was made for lives, if one of the lives had not been heard of for more than seven years, it might be assumed to have dropped. Lastly, in our own day, the Matrimonial Causes Act, 1937, had provided that a petition for dissolution of marriage may be presented where a spouse has not been heard of for seven years and there is no reason to suppose that he or she is alive.

These are rules of convenience, but they have led to the view that there is, in the learned judge's words, "a kind of magic in seven years, and indeed there are indications of statements that for seven years one will presume a man to be alive, though one does not hear of him, but at the end of that time the presumption drops, and presumably a presumption arises that the man is dead." The absence in *Re Watkins* was much more than seven years, and this was the presumption on which the plaintiff based her alternative case, when the original case which she had put forward had foundered. On the other hand, it was said, mere absence without anything more had no effect at all, and that it was necessary for the person relying on this so-called presumption to show that, in addition to absence, there had been search and inquiries for and concerning the missing person which had produced no information. The authorities which support, or seem to support, both these arguments are referred to very fully in the judgment in *Re Watkins*, and will have to be looked at carefully in any similar case in the future. Their total result, from the present point of view, is not easy to assess. Harman, J., appears to have accepted the criticism made by the defence of the plaintiff's case, viz., that she had not made a sufficient number of inquiries about her first husband at or about the time of his disappearance, as potentially an admissible objection to a case put forward on the basis of a presumption from long absence, but dismissed it as invalid on the facts. There were, it appeared, certain inquiries which the plaintiff might then have made and did not, but it was found as a fact that she had kept in touch with some members of her first husband's family, and that these people had heard nothing of him for a number of years after his disappearance and assumed him to be dead, and on these facts Harman, J., held that a jury would be entitled to infer, at that distance of time, that the first husband was dead in 1948 (the date of the second marriage in the case). It would, he added, be a sorry state of things if for criminal purposes a jury might assume that a man was dead, and for the purposes of the Divorce Division a similar presumption might be made, but in the Chancery Division no such presumption might be made.

The decision was, therefore, that the plaintiff was entitled to assume, by 1948, that she was free to marry and describe herself then as a widow, and the presumption was that she had been right.

Two points arise on this decision. The first is that although the seven-year rule in civil cases is one which may have had a statutory origin, the cases in ejectment particularly having been decided, so far as one can see, on the statute of Charles II, it seems to have acquired in time an extra-statutory force which makes it applicable in cases where, strictly, the statute with its express reference to leases for lives does not apply. The speech of Lord Blackburn in *Prudential Assurance Co.* v. *Edmonds* (1877), 2 App. Cas. 487, a case on a policy of insurance, certainly suggests that the rule has a general existence. It may be, therefore, that there really is some magic about this period of seven years. On the other hand, in *Re Peete*, Roxburgh, J., apparently envisaged the possibility of presuming death from absence for a period of only about three years; but there was no argument on this point in that case, the suggestion of such a possibility coming from the Bench, as it were, as an afterthought. Secondly it is not clear from either of these cases how much weight is to be given to the objection that the plaintiff made no inquiries or search, or insufficient inquiry or search. The plaintiff in *Re Watkins*, by keeping in touch with some of her first husband's family, could be said to have made some inquiries, in that she put herself in the way of hearing of her husband if anything had been said of him by persons who, together with herself, were the persons with whom he would have been expected to communicate if he were alive. Whether a similar case, where no inquiries at all were made, not even in this limited sense, could succeed, however long the absence, is something still to be decided.

"A B C"

Landlord and Tenant Notebook

CONTROL: RECOVERY OF PARTS SUB-LET

WHILE the tenant's appeal in *Berkeley* v. *Papadoyannis* [1954] 3 W.L.R. 23 (C.A.); *ante*, p. 390, was based on three distinct grounds, the court was content to allow it on one of them, an interesting point, though perhaps not as interesting as at least one of the others which had been raised.

The facts were, briefly, that the tenant had held a contractual tenancy of a maisonette from October, 1944, till October, 1947, and had then held over as a statutory tenant. The maisonette consisted of the three upper floors of a four-storeyed house, but contained only one bathroom and w.c. The tenant and his wife had at one time occupied the first and second floors; when the action was brought, they occupied the second floor and one room on the third floor (which consisted of four rooms, the one in question being merely a box-room) and had sub-let the first floor and the rest of the third floor, furnished. The action, originally for possession of the whole maisonette, was subsequently limited to the sub-let parts; and the county court judge held that, on the authority of *Crowhurst* v. *Maidment* [1953] 1 Q.B. 23 (C.A.), the plaintiff was entitled to succeed.

The facts of *Crowhurst* v. *Maidment* were that the defendant had taken a house (it happened to be one in the same district as that with which *Berkeley* v. *Papadoyannis* was concerned) and had sub-let its two upper floors to different sub-tenants; the contractual tenancy expired, and the landlord claimed possession of the two upper floors (the sub-tenants not being made defendants). So far, there is a marked resemblance between these facts and those of the recent case; but in deciding in the plaintiff's favour, the Court of Appeal emphasised that the defendant had not occupied the upper floors during his contractual tenancy, and had no intention of residing in them. It was held that the *Skinner* v. *Geary* [1931] 2 K.B. 546 (C.A.) principle applied; the object of the Rent, etc., Restrictions Acts is to protect tenants in the enjoyment of their homes; the defendant's home, in the ordinary acceptation of the term, consisted exclusively of the

ground floor (Evershed, M.R.); there was a permanent cutting off of the two top floors from the rest (*ib.*); there were three dwelling-houses, not one, and a tenant and sub-tenant could not both be the occupier of a dwelling-house (Romer, L.J.).

The facts so emphasised were not, according to the Court of Appeal, present in *Berkeley* v. *Papadoyannis*; this though the county court judge had also found that the defendant had taken a maisonette which was too large for him because he could not get a smaller one, and had made it quite clear that he intended to sub-let part or parts. The fact that he and his wife had at various times occupied different parts of the house and "might continue to do so in the future" was, it was held, sufficient to distinguish the case from that of *Crowhurst* v. *Maidment*. "The mere fact that a part of the premises has been sub-let does not raise an implication that the *Skinner* v. *Geary* principle is applicable to that part. The tenant is fully entitled to suspend any decision as to whether, if any sub-tenant should go, he would or would not reoccupy the whole or any part of the premises sub-let. The tenant, while remaining in the rest of the premises, has done no more than sub-let parts of the dwelling-house. This plainly does not in itself forfeit the protection of the Acts" (Somervell, L.J.).

This judgment (the only one delivered) does not expressly refer to the point made by Romer, L.J., in *Crowhurst* v. *Maidment*, which might be put in this way: a statutory tenant's rights are the creature of the Increase of Rent, etc., Restrictions Act, 1920, s. 15 (1): "A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy . . ."; it is the occupier of the dwelling-house, and the occupier alone, who gets the protection of the Acts. The point was, however, strictly speaking made *obiter* ("I will only add, speaking for myself . . .") ; and the answers which suggest themselves, at all events to-day, are (i) that the subsection does not actually create the "statutory" tenancy, but merely regulates a position already brought about by the restrictions on the right of a court to make an order for possession; (ii) that *Brown* v. *Draper* [1944] K.B. 309 (C.A.), the recent *Cove* v. *Flick* [1954] 3 W.L.R. 82*n*; *ante*, p. 422, and similar decisions have shown that third parties may vicariously occupy a dwelling-house; and (iii) that *Moodie* v. *Hosegood* [1952] A.C. 61 has demonstrated that, where rent control is concerned, our courts need not be afraid of applying metaphysics.

It will also be observed that for practical purposes there was this difference between the two sets of facts: in *Crowhurst* v. *Maidment* the plaintiff's victory did not give him immediate possession of the parts sub-let, the sub-tenants being protected by the Increase of Rent, etc., Restrictions Act, 1920, s. 15 (3). What he achieved was, as it were, the elimination of the middleman; which may, of course, possibly have been an advantage, e.g., if a sub-tenant left, or "forfeited" his protection. In *Berkeley* v. *Papadoyannis*, while the sub-tenants were again not brought in, the fact that the sub-lettings were "furnished" would make the prospects of obtaining possession rather brighter, at all events if the reasoning applied in *Francis Jackson Developments, Ltd.* v. *Hall* [1951] 2 K.B. 448 (C.A.) be sound. But the view taken of the facts of the recent case recalls the decision in *Vickery* v. *Martin* [1944] K.B. 679 (C.A.), in which it was held that a tenant did not lose protection by using the house as a guest-house, herself occupying now one part and now another part of the premises. If one regards the defendant in *Berkeley* v. *Papadoyannis* as doing much the same sort of thing, it is easier to appreciate the distinction drawn between this case and *Crowhurst* v. *Maidment*.

R. B.

HERE AND THERE

PREMATURE FUNERAL

THE rich attorney, the briefless barrister and the famous Queen's Counsel are a trinity who, in the public mind, have long formed a composite picture of the practising side of the legal profession. On the whole, the public resent the rich attorney, envy the famous Queen's Counsel and have a compassionate contempt for the briefless barrister. Modern conditions have modified without substantially altering the pattern. The rich attorney is not quite so rich as he was, though he still manages to leave an impressively large estate. The famous Queen's Counsel, owing to the flattening of personalities in a mechanised age, is not quite so famously outstanding as he was. Only the briefless barrister remains as briefless as ever, perhaps, to use an oxymoron, more so. In the melancholy contemplation of his brieflessness, several correspondents of the *Daily Telegraph* have been recently chanting the funeral dirge of the Bar and an evening paper has published a somewhat depressed and depressing article "by a barrister" on the frustrations and sufferings of his colleagues who subsist on half-guinea lectures as a substitute for the scarcely more glittering prizes of two-guinea advocacy. But the Bar has been "dying" for a very long time. It has been an unconscionable time in dying but the invalid, to judge by the call lists, is still far from perishing of anaemia. Almost one can apply to the Bar the old joke about marriage, that it is like a besieged fortress; those outside want to get in and those inside want to get out. Still, just as despite the activities of the Divorce Court (which incidentally provides support for such a large portion of the forensic edifice), the institution of marriage remains central in society, so too, despite the special difficulties and vicissitudes always inherent in the practise of an art, the Bar remains central in the legal system. A hundred years ago the professional Press (as well as Charles Dickens and a crowd of outside critics) were saying much the same things about the Bar as are being said to-day, the almost impossibly slow start for the beginner, the overcrowding of the profession, the hopelessness of making a living in the first half a dozen years at least, the concentration of lucrative work in a few hands. It's all there except our own special problems of taxation. It's all there because it is inherent in the nature of the thing done. Precisely the same picture could be drawn of the world of painting and the world of the stage.

NECESSARY RISKS

IT's always sad to see merit and talent swamped by adverse circumstances but, then, what are merit and talent? It depends on what you're doing: advocacy is not a soft job, and how would you get men equal to it if you softened its hazards, assuming that that were even possible? "For goodness sake stand up to the court; that's what you're paid for," a furious Lord Justice once said to a barrister who was taking a severe judicial heckling too meekly and submissively. And there's a great deal in the advice which was given to Lord Justice Somervell as a boy thinking of coming to the Bar, "There's more guts than brains in this profession." Advocacy is a form of the art of fighting, and the security-minded will never make more than a parade ground soldier. There are casualties, of course, among the best. The young

Napoleon might have been killed on the bridge at Arcola. Nelson might have been killed at Calvi, but it is only such hazards that can produce the fighting soldier or sailor. The career of John William Smith of the Leading Cases, that versatile genius, illustrates the hazards of the barrister's career at all its stages. He joined the Inner Temple in 1830. He was called to the Bar in 1834. For eight years he lay pretty well becalmed, as far as solid practice went, or, at the start, any practice at all. He published two legal masterpieces, his Mercantile Law and his Leading Cases. He lectured brilliantly to solicitors' clerks. He thought of going into the Church. He contemplated military engineering. "While the grass grows the steed starves," he said. Then, at last, work came in a flood. He toiled at it unremittingly and in three years it killed him, burnt out at the age of thirty-six.

DOUBTFUL REMEDIES

ONE of the remedies sometimes proposed for the insecurity of the advocate is to allow barristers to work in partnership. Another, of course, is the fusion of the professions. The chambers system would adapt itself pretty easily to partnership but, by an unexpected twist, it might make recruitment to the Bench more difficult and one of the functions of the Bar is to train up for the judiciary a body of men experienced in court work. The ease and security of a senior partnership might well tend to pull the older men away from acceptance of the laborious lot of judgeship. Canada, I believe, experiences that very difficulty. The fusion of the professions is an indefinitely wide subject, but the functional differences between solicitor and barrister, once appreciated, constitute an insuperable objection. The first qualities for a solicitor (whatever other ones he may possess, and they all come in useful) are to be steady, methodical, careful, a good administrator, a desk man, the complete legal business man. The more Protean qualities of the verbal fencer, the man who works on his feet, sizing up a situation or an atmosphere in a flash, call for a wholly different order of training and background. The unique menace to the Bar in our own time is the policy of confiscatory taxation which prevents men whose health, whose voice and whose vitality (all wasting assets) are their only stock in trade from saving for the night when no man can work. Short of a change of heart in those who control the fiscal machine, the hope of the Bar, as of all the arts, lies in the resilience of the human spirit and in the appearance in every generation of adventurous men to whom life is creative and not just a safe living wage.

RICHARD ROE.

BOOKS RECEIVED

The County Court Practice, 1954. By HIS HONOUR JUDGE EDGAR DALE, MR. REGISTRAR BRUCE HUMFREY, D.L., J.P., and R. C. L. GREGORY, LL.B., of Gray's Inn, Barrister-at-Law. 1954. pp. ccxxxiii, 1826 and (Index) 160. London: Butterworth & Co. (Publishers), Ltd., Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. £3 15s. net.

"Taxation" Key to Income Tax and Sur-tax. Edited by RONALD STAPLES. 1954. pp. 222. London: Taxation Publishing Company, Limited. 7s. 6d. net.

Suggestions for the Legal Protection of Laboratory Animals Overseas. Prepared by the Scientific Sub-Committee of the Universities Federation for Animal Welfare. London. 1954. pp. 9. Available gratis.

A Selected List of Lands Tribunal Rating Appeals, 1952–1953. 1954. pp. xxv and (with Index) 114. London: The Rating and Valuation Association. 16s., post free.

Dayes' Handy Book of Solicitors' Costs. Ninth Edition. By T. O. CARR. 1954. pp. xiv and 341. London: Sweet and Maxwell, Ltd. £2 2s. net.

Key and Elphinstone's Precedents in Conveyancing. Fifteenth Edition. Volume 3. Registered Land. By HAROLD POTTER, LL.D., of Gray's Inn, Barrister-at-Law. Edited by THOMAS IVOR CASSWELL, B.A., a Registrar in H.M. Land Registry. 1954. pp. xxxvi and (with Index) 678. London: Sweet & Maxwell, Ltd. 3 Volumes, £15 15s. net.

Arnould on the Law of Marine Insurance and Average. Volumes 1 and 2. Fourteenth Edition. By LORD CHORLEY OF KENDAL, M.A. (Oxon), of the Inner Temple and Northern Circuit, Barrister-at-Law. 1954. pp. (Vol. 1) lxxxiii and 497 and (Vol. 2) (with Index) 501 to 1350. London: Stevens and Sons, Ltd. 2 Volumes, £8 8s. net.

Kime's International Law Directory for 1954. Sixty-second year. Edited and Compiled by PHILIP W. T. KIME. 1954. pp. xiv and 532. London: Butterworth & Co. (Publishers), Ltd.; Kime's International Law Directory, Ltd. 15s. net.

Questions and Answers on Equity. Third Edition. By CLIFFORD W. RIVINGTON, B.A. (Oxon), of the Middle Temple, Barrister-at-Law. 1954. pp. vi and 182. London: Sweet & Maxwell, Ltd. 6s. 6d. net.

REVIEWS

Stone's Justices' Manual, 1954. Eighty-sixth Edition. Volumes 1 and 2. Edited by JAMES WHITESIDE, Solicitor, Clerk to the Justices for the City and County of the City of Exeter, and J. P. WILSON, Solicitor, Clerk to the Justices for the County Borough of Sunderland. 1954. London: Butterworth and Co. (Publishers), Ltd.; Shaw & Sons, Ltd. Thin Edition, £4 2s. 6d. net. Thick Edition, £3 17s. 6d. net.

The new edition incorporates the statutes passed and the cases reported in 1953 and the more important of these are reviewed in the preface, which is dated 26th January, 1954. It is not necessary to say very much about "Stone"; the new edition is indispensable to magistrates' clerks and to all practitioners who have a large practice in magistrates' courts, and it has been edited with the care and accuracy long associated with its editors. We know of no other book edited by two men only which covers so vast a field, for agriculture, husband and wife, landlord and tenant, licensing and road traffic are among the subjects covered in addition to magisterial and criminal law and evidence.

Mr. Whiteside and Mr. Wilson deserve the congratulations and thanks of the profession and of all who work in magistrates' courts for their industry in bringing out another edition of this invaluable book and for the care and erudition shown in revising it.

A Concise Law Dictionary. Fourth Edition. By P. G. OSBORN, LL.B. (Lond.), of Gray's Inn, Barrister-at-Law. 1954. London: Sweet & Maxwell, Ltd. 17s. 6d. net.

Though primarily intended for the law student, the Concise Law Dictionary has established itself as a useful reference book in wider circles. Notwithstanding its presentation in a more compact style, the work has grown slightly in size since the last edition seven years ago. Its emphasis remains on the modern law.

According to the Evidence. By HENRY CECIL. 1954. London: Chapman & Hall, Ltd. 10s. 6d. net.

But for an ending that lacks climax and dramatic surprise, this is a very enjoyable book, in the style which has already gained the author an appreciative following. His strong point here, as always, is his satirical yet matter-of-fact picture of lawyers at work in or out of court, and the mischievous twists by which he demonstrates the possibilities of subterfuge and stratagem inherent in the manipulation of legal procedure by those who know its byways as well as its highways. The central episode is a murder trial. The problem is the fate of an exceedingly agreeable and, indeed, public-spirited murderer.

Country Practice

HOW TO EARN A CONDUCTING FEE

In big cities, I have never been to a sale room that did not remind me of a drill hall, or a mortician's parlour of rest, or both. In the countryside, we can sometimes do without sale rooms, especially where the auctioneer is a farmer first, and mounts the rostrum only when the harvest and other farming duties permit. Auctioneers' licences, as the reader need not be reminded (if he has recently studied the Auctioneers Act, 1845), are granted to anyone who can fill in, or at any rate sign, the necessary application form addressed to the Collector of Inland Revenue. So, while most estate agents even in country districts are highly skilled at their job, it is not unknown to come across the farmer-auctioneer who cannot satisfactorily draft a sale bill. At livestock auctions he is in his element, but when, to oblige a neighbour, he is to sell real property, the vendor's solicitor fully earns the conducting fee authorised by the Solicitors' Remuneration Act, 1881.

Advertisements, both posters and in the weekly Press, have to be settled, the key of the property has to be made available at the next door neighbour's, and certain steps have to be taken with a whitewash brush in the case of truly rural cottage property. Numerous enquirers have to be satisfied that the reserve price is a secret locked in only the vendor's bosom, to be disclosed to the solicitor and the auctioneer a few minutes before the sale. The latter detail is most important; a vendor wishing to confer about the reserve price must be hushed and shushed severely. Only in this way can one be certain of a sufficient crowd turning up at the auction, if only to find out which rumour about the reserve price is the correct one.

In an important sale—where the property might even fetch £500—one must arrange for the sale to take place in the town hall, choosing an afternoon when it is not in use as a court house or as the venue for a Conservative fête. The less important sales take place in the evening, in the actual village, at the village pub. The least important sales take place *in situ*, if the property is still deemed sufficiently rainproof.

The auctioneer comes into his own on The Night. Especially when the sale is to take place at the village pub, he will arrive a quarter of an hour early, out of pure zeal. I have seen him do so. There is the room to arrange, for one thing—a table to be placed at one end, where nobody can peep over the auctioneer's shoulder. The position of the door and the bar are other factors to be taken into consideration when conducting a sale.

The gathering is very temperate and serious. The neighbours must comport themselves as if they might be tempted into property speculation, and the ladies, who have not the slightest intention of bidding, but can't bear to miss the excitement, obviously would not be in licensed premises at all if they were not ready to crash into the real property market at the drop of a hammer. On the other hand, our rival, the solicitor from the next market town, is already in his comfortable armchair, enjoying his half pint as though this were a purely social occasion, and as if his only purpose in remaining for the auction were to display a friendly curiosity.

Promptly, five minutes after the advertised time, the business commences. I read the conditions, and in the small bar parlour I find that I can impart warmness and an intimate feeling into the longest of the printed clauses. The audience listens beautifully, apart from our rival who, by facial expression only, is trying to damp the sale. Questions are invited and, if put, politely dodged.

Then, at last, the auctioneer gets under way and, amid excited gasps from the audience, the price whizzes up to £355, when the property is knocked down to our friendly rival. As in duty bound, he tells us in confidence (but so that our own client can hear) that the price went right up to the top limit of his client's instructions.

Meanwhile, the tension relaxes, the audience stretches itself and conversation starts up with hum and chatter. An extra light is switched on in the bar, and the spotlight seems to fade from the auctioneer's table. It occurs to the vendor that signing the contract is thirsty work; and we do rather agree.

"HIGHFIELD."

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

COURT OF APPEAL

MAINTENANCE: PETITION ALLEGING WIFE'S ADULTERY: REFUSAL TO MAINTAIN PENDING HEARING

West *v.* West

Evershed, M.R., Denning and Hodson, L.JJ. 26th May, 1954

Appeal from Judge Rewcastle sitting as special commissioner.

On 16th March, 1953, a wife took out an originating summons under s. 23 of the Matrimonial Causes Act, 1950, for maintenance. Two days later her husband presented a petition for the dissolution of his marriage on the ground of the wife's adultery, and the application for maintenance was adjourned to come on for hearing with the petition. On 12th February, 1954, the commissioner found as a fact that the wife had not been guilty of adultery and dismissed the husband's petition. On 15th February, 1954, he heard the wife's application under the Act of 1950 and expressed the opinion that the husband had, until the petition was dismissed, reasonable grounds for suspecting that the wife had committed adultery. The commissioner, however, held that the husband had been guilty of wilful neglect to provide reasonable maintenance and, pending the investigation of the parties' means, ordered the husband to pay to the wife £4 per week. The husband appealed.

EVERSHED, M.R., said that though in *Allen* v. *Allen* [1951] 1 All E.R. 724 it was said that once there had been a decision on the question of fact whether or not adultery had been committed or had been proved, and that decision was favourable to the alleged adulterer or adulteress, there was no room left for belief, such a finding did not operate retrospectively or retroactively. Consequently the finding on the petition was conclusive to prevent the husband thereafter seeking to establish a *bona fide* belief in the wife's adultery but did not prevent him from alleging that until the court so found he *bona fide* and reasonably believed that his wife had committed adultery, and for that reason his alleged desertion or failure to maintain was justified. Accordingly, the husband was entitled to say on 15th February, 1954, that he had an answer to the summons issued in March, 1953, which should have been dismissed.

DENNING and HODSON, L.JJ., agreed. Appeal allowed.

APPEARANCES: *Douglas Draycott* (*Underwood & Co.*, for *J. Foley Egginton & Co.*, Sutton Coldfield); *William Latey*, Q.C., and *C. A. Beaumont* (*Golding, Hargrove, & Palmer*, for *R. Wood & Co.*, Birmingham).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [3 W.L.R. 163

DIVORCE PRACTICE: AMENDMENT OF ANSWER: NEED FOR SUPPORTING AFFIDAVIT

Cheetham *v.* Cheetham

Evershed, M.R., Denning and Hodson, L.JJ. 27th May, 1954

Appeal from Judge Fenwick, Q.C., sitting as a special commissioner.

A husband petitioned for divorce on the ground of desertion. His wife in her answer alleged that the husband had been guilty of adultery and desertion by leaving the matrimonial home and she asked to have the marriage dissolved. After service of the answer to the petition, the wife's solicitors applied to have the allegation of adultery struck out of the wife's answer. The reason for the application was that they did not consider the evidence of the husband's adultery sufficient. No affidavit was filed in support of that application but the registrar struck out of the answer the allegation of adultery. The husband did not proceed with his petition and the case was tried on the answer of the wife. The commissioner rejected the wife's prayer for dissolution. The allegation of adultery had been withdrawn and no explanation had been given why it was withdrawn. Consequently, although the husband had left the home it was not shown that his conduct was equivalent to desertion. The commissioner was of opinion that it was merely separation by consent. The wife appealed.

EVERSHED, M.R., said that the evidence, when considered, was sufficient basis for a *bona fide* and reasonable belief by the wife that the husband had committed adultery (although the solicitors for the wife had been of opinion that it might not be sufficient to support the allegation), and the departure of the husband from the matrimonial home was equivalent to a determination on his part to put an end to the marriage relationship. The wife, therefore, was entitled to a divorce on the ground of desertion.

DENNING, L.J., agreed.

HODSON, L.J., agreed, adding that the commissioner had been misled because no affidavit had been filed in support of the application for leave to amend the answer, and consequently the commissioner had not the facts relating to the withdrawal of the allegation of adultery fully before him. Rule 15 (3) of the Matrimonial Causes Rules, 1950, which requires that an application for leave to amend a petition after service be supported by an affidavit, applied to the wife's answer to the petition. Appeal allowed.

APPEARANCES: *G. M. Vos* (*Hargreaves & Crowthers*, for *Alan Marshall*, Barrow-in-Furness); the husband did not appear.

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [1 W.L.R. 990

CHARITY: EXEMPTION FROM INCOME TAX: FOREIGN CORPORATION

Camille and Henry Dreyfus Foundation, Inc. *v.* Inland Revenue Commissioners

Evershed, M.R., Jenkins and Hodson, L.JJ. 3rd June, 1954

Appeal from Wynn Parry, J.

The plaintiff corporation was a body incorporated in the State of New York as a membership corporation under the Membership Corporation Law of that State. The corporation was resident outside the United Kingdom and had never conducted any operations in this country. The corporation applied to the Commissioners of Inland Revenue for exemption from income tax in respect of the corporation's income (derived from certain royalties in this country) which was liable to tax under Case III of Schedule D, on the ground that the corporation was "a body of persons established for charitable purposes only," and so entitled to exemption under s. 37 (1) (*b*) of the Income Tax Act, 1918. The claim of the foundation to exemption from tax was rejected by the Commissioners of Inland Revenue and, on appeal, by the Special Commissioners. On further appeal to the judge by case stated Wynn Parry, J., agreed with the commissioners. The foundation appealed.

EVERSHED, M.R., said that in the phrase "body of persons established for charitable purposes only" in s. 37 (1) (*b*) of the Income Tax Act, 1918, "for charitable purposes only" meant purposes which were what the laws of the United Kingdom defined as charitable and held to fall within the special significance of that word. Although there were undoubtedly instances of trusts being held or regarded as charitable which were exclusively for the benefit of objects outside the United Kingdom (see *Income Tax Commissioners* v. *Pemsel* [1891] A.C. 531), the exemption in s. 37 (1) was limited to "bodies of persons" so constituted and regulated as to be in reference to the income in question subject to the jurisdiction of the United Kingdom courts, and a foreign corporation carrying on its activities abroad was not entitled to the exemption conferred by that section. His lordship considered *In re Robinson* [1931] 2 Ch. 122. A body such as the foundation, though incorporated under the laws of a foreign country and being, therefore, a foreign corporation, might derive all its income from the United Kingdom and carry on all its activities in the United Kingdom. In such case (though it was not necessary to decide the point) the foundation might successfully assert that it was "a body of persons established for charitable purposes only." If there were any ambiguity in the construction of s. 37 (1) (*b*), recourse could be had to the construction placed by Parliament on that section by s. 21 of the Finance Act, 1923, s. 32 of the Finance Act, 1924, and s. 21 of the Finance Act, 1925, from which it appeared that on the secession of the Irish Free State Parliament considered that Irish Free State charities would no longer be entitled to claim exemption from income tax under s. 37 in the absence of legislation continuing it in their favour. His lordship considered the decision of Lawrence, J., in *Inland Revenue Commissioners* v. *Gull* (1937), 21 T.C. 374, 378, and pointed out that though he rightly held that the trust in question was not entitled to exemption within s. 37 of the Income Tax Act, 1918, in so far as he expressed the view that the terms of s. 21 of the Finance Act, 1923, s. 32 of the Finance Act, 1924, and s. 21 of the Finance Act, 1925, effectively gave, retrospectively, an interpretation to the material terms of s. 37 of the Income Tax Act, 1918, which those terms would not otherwise bear, his reasoning would be in conflict with the decisions of the House of Lords in *Ormond Investment Co., Ltd.* v. *Betts* [1928] A.C. 143, approving *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* [1921] 2 K.B. 403, 414, and subsequently in *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co., Ltd.* [1952] A.C. 401; [1952] 1 All E.R. 531.

JENKINS and HODSON, L.JJ., agreed. Appeal dismissed. Leave to appeal.

APPEARANCES: *Heyworth Talbot*, Q.C., and *Philip Shelbourne* (*Linklaters & Paines*); *Borneman*, Q.C., *J. H. Stamp* and *Sir Reginald Hills* (*Solicitor of Inland Revenue*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [3 W.L.R. 167

UNDISTRIBUTED INCOME OF COMPANY IN LIQUIDATION: SUR-TAX DIRECTION UNDER FINANCE ACT, 1922, s. 21

A. & J. Mucklow, Ltd. (in liquidation) *v.* Inland Revenue Commissioners

Evershed, M.R., Jenkins and Hodson, L.JJ. 3rd June, 1954

Appeal from Harman, J.

A. & J. Mucklow, Ltd., was incorporated in April, 1939. On 9th December, 1943, the company, never having paid a dividend, went into voluntary liquidation for purposes of reconstruction. Shortly afterwards its business was sold to a new company of the same name. About £35,000 was excluded from the sale and was paid by the liquidator to the shareholders of the old company, who were also the only shareholders of the new company. A direction was made under s. 21 of the Finance Act, 1922 (amended by s. 31 (4) of the Finance Act, 1927, in its application to companies in liquidation), in respect of the company's income during the broken accounting period from 1st May, 1943, to the date of the winding-up resolution on 9th December, 1943, and was confirmed both by the Special Commissioners and on appeal by Harman, J., on the ground that on the facts the company had acted unreasonably in refraining from making a distribution and had not distributed a reasonable part of the income for the period in question. The company appealed.

EVERSHED, M.R., said that the finding by the commissioners was supported by the facts and was not based on any material misdirection of law. The commissioners had rightly applied the test stated by Lord Atkin in *Thomas Fattorini* (*Lancashire*), *Ltd.* v. *Inland Revenue Commissioners* [1942] A.C. 643; 24 Tax Cas. 328, at p. 351, as regards the onus of proof. They had rightly rejected the view that direction under s. 31 (4) of the Finance Act, 1927, was automatic (notwithstanding *H. Collier & Sons, Ltd.* (*in liquidation*) v. *Inland Revenue Commissioners* [1933] 1 K.B.

488; 18 Tax Cas. 83). Further, they had rightly concluded that the needs of the new company were not relevant in deciding whether the company had distributed a reasonable part of the income for the period in question. In s. 31 (4) of the Act of 1927 " income available for distribution " does not mean " income which ought to have been distributed " but income which the company can in fact, and properly, pay out by way of dividend to its members. Section 31 (1) excludes the income for the broken period from the proviso to s. 21 of the Act of 1922 but it does not follow that s. 31 was intended to create an automatic liability for tax, and as Lord Atkin said in *Fattorini's* case, *supra*, no such liability should be found unless it was stated in unambiguous terms. In *Collier's* case, *supra*, Finlay, J., at first instance found that the decision of the commissioners that the company had not distributed a reasonable part of its income for the broken period was a decision of fact which was conclusive. On appeal, Romer, L.J., found against the company on the same ground. Slesser, L.J., however, proceeded on a different basis. Wrongly construing s. 21 of the Act of 1922, he reached the conclusion that s. 31 (4) of the Act of 1922 imposed an automatic liability which excluded any need of further consideration whether in fact the company had distributed a reasonable part of the income for that period. On the principle stated in *Young* v. *Bristol Aeroplane Co.* [1944] K.B. 718, that conclusion was, therefore, subject to review by the Court of Appeal. Lord Hanworth, M.R., did not specifically state his view on this point, but if he agreed with Slesser, L.J. (and Slesser, L.J., said that they did agree on this construction), then the disabling quality in the judgment of Slesser, L.J., equally affected the judgment of the Master of the Rolls. If, however, he did not agree, the *ratio decidendi* of Slesser, L.J., stood alone.

JENKINS and HODSON, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *J. Millard Tucker*, Q.C., and *G. B. Graham* (*Scott & Son*); *Heyworth Talbot*, Q.C., *Sir Reginald Hills* and *Montagu Temple* (*Solicitor of Inland Revenue*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [3 W.L.R. 129

CHANCERY DIVISION

WILL: GIFT OF HOUSE AND " ANY POSSESSIONS I MAY HAVE " TO *A* " ON CONDITION THAT SHE WILL ALWAYS PROVIDE A HOME FOR " *B*: SCOPE OF GIFT: WHETHER UNCERTAIN

***In re* Brace, deceased; Gurton *v.* Clements**

Vaisey, J. 6th May, 1954

Adjourned summons.

A testator by his will provided: " I give and bequeath unto my daughter Irene my house at 25 Apton Road, Bishop's Stortford, together with the contents of same and any possessions I may have, on condition that she will always provide a home for my daughter Doris at the above address." There was no gift over. The testator's estate consisted of the house, furniture and effects, cash at a bank, proceeds of an insurance policy and arrears of a pension. A summons was taken out asking (1) whether the gift included the whole residuary personal estate; (2) whether the condition was void for uncertainty.

VAISEY, J., said that, first, on the authority of *Fleming* v. *Burrows* (1826), 1 Russ. 276, the gift of " any possessions I may have " included the whole personal estate. On the second question it was difficult to see how a provision that *A* should provide a home for *B* had such definite significance as to enable the court to say what were the obligations involved. It had been suggested that *In re Richardson* [1904] 2 Ch. 777 was almost conclusive of the present case. But first, in that case there were words more clearly definitive of the duties of the beneficiary, and, secondly, there was a gift over. In the present case it appeared that the testator never contemplated anything in the nature of a forfeiture; if the condition was binding, Irene could do nothing with the cash or the furniture: that pointed strongly to the conclusion that the words were merely precatory. There were a number of authorities to show that extreme caution must be used in framing conditions subsequent. The expression " to provide a home " was not only extremely vague, but positively unintelligible. The conclusion was that Irene was entitled absolutely to the residue, as the words about " providing a home " must be regarded as precatory in the absence of a gift over; or, if regarded as a condition of defeasance, they were void for uncertainty. Declaration accordingly.

APPEARANCES: *D. H. McMullen*; *R. Walton*; *A. J. Balcombe* (*Barlow, Lyde & Gilbert*, for *H. Stanley Tee*, Bishop's Stortford); *W. F. Waite* (*Official Solicitor*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 955

PRACTICE: RECALL OF ORDER PRONOUNCED BUT NOT ENTERED

***In re* Harrison's Share under a Settlement; Harrison *v.* Harrison**

***In re* Williams' Will Trusts; Williams *v.* Richardson**

***In re* Ropner's Settlement Trusts; Ropner *v.* Ropner**

Roxburgh, J. 28th May, 1954

Application for orders already made to be entered.

Applications were made for approval by the court on behalf of infants, unborn and unascertained persons of three schemes affecting family trusts. On 15th and 17th March, 1954, a judge in chambers pronounced orders approving the three schemes. On 25th March, 1954, the House of Lords gave its decision in *Chapman* v. *Chapman* [1954] 2 W.L.R. 723; *ante*, p. 246, holding that a judge of the Chancery Division has no inherent jurisdiction, in the execution of the trusts of a settlement, to sanction, on behalf of infant beneficiaries and unborn persons, a rearrangement of the trusts of that settlement for no other purpose than to secure an adventitious benefit. On 25th March, 1954, none of the three orders in question had been entered and the judge, acting under s. 110 of the Supreme Court of Judicature (Consolidation) Act, 1925, directed the registrars concerned not to proceed further with them, as he desired to hear further argument and to inform the parties accordingly. On the matter being adjourned into court, all parties to the applications contended that the judge had no power to, or alternatively ought not to, recall the orders which he had pronounced.

ROXBURGH, J., said that in view of *Chapman* v. *Chapman*, *supra*, the schemes in question could not be sanctioned if now brought before the court for the first time. The applicants had put forward three arguments: (1) that no orders such as those now before the court could be recalled; (2) alternatively that no such order could be recalled on the initiative of the judge himself; (3) alternatively that in the present cases the orders ought not to be recalled. The real question was whether a judge retained sufficient control over a case to be able to recall it before it was perfected by entry. That a judge could do that on the initiative of a party must be treated as settled, notwithstanding *Ex parte Hookey* (1862), 4 De G. F. & J. 456; authorities for the proposition included *In re Australian Direct Steam Navigation* (1876), 3 Ch. D. 661; *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. In *In re Roberts* [1887] W.N. 231, Kay, J., said in general terms that where an order had not been drawn up, whether made in chambers or in court, the judge had a right to stay the drawing up and rehear the matter. There were later authorities to the same effect. On the second point, there was no reported case, but there were no *dicta* suggesting that an application was necessary to confer the jurisdiction, which was not appellate in nature, but existed because the jurisdiction which the parties had invoked was still continuing; there might be cases where the mistake might only be known to the judge himself. The answer must be that the judge could act on his own initiative. Lastly, in view of *Chapman* v. *Chapman*, *supra*, it was necessary to recall the orders and order a rehearing; the parties did not want a rehearing, as the result was a foregone conclusion. Applications dismissed.

APPEARANCES: *R. Jennings*, Q.C., and *L. M. Jopling*; *F. G. King*; *J. M. Price*; *T. A. C. Burgess*; *E. M. Winterbotham*; *R. S. Lazarus*; *D. A. Ziegler*; *T. K. Wigan*; *B. S. Tatham*; *J. G. Monroe* (*Theodore Goddard & Co.*; *Pontifex, Pitt & Co.*; *Tamplin, Joseph & Flux*, for *Darling, Heslop & Forster*, Darlington).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [3 W.L.R. 156

QUEEN'S BENCH DIVISION

SALE OF GOODS: SECOND-HAND GOODS TO BE SOLD WITH CERTIFICATE OF QUALITY: NATURE OF CERTIFICATE

Minster Trust, Ltd. *v.* Traps Tractors, Ltd.

Devlin, J. 19th May, 1954

Action.

Earth-moving plant and machinery had been let out by a seller on hire to contractors. The contract provided that " on the

completion of the hire each machine will be . . . reconditioned by you" [the contractors] ". . . under the supervision and to the satisfaction of the Hunt Engineering Company and the hire will cease on . . . the issuance of their certificate that the machines have been satisfactorily overhauled on a fully reconditioned basis." The Hunt Engineering Company, which the seller instructed to act on his behalf under that contract, was a company which inspected and reported on machinery and whose certificate was universally recognised as the mark of a good machine. While the work of reconditioning was being carried out under the supervision of Hunts and before their final reports had been made, the seller sold the machinery by a contract of sale which provided that: "All these machines are to be supplied with the Hunt Engineering Certificate that they have been fully reconditioned to their satisfaction." Both parties thought that Hunts had an "A" standard which was the equivalent of 85 per cent. new, but in fact their notion of 85 per cent. was incorrect and Hunts' standard, though high, varied for different parts of the machine and was subject to instructions received from their client, and the company did not regard themselves as certifying but as reporting to their customer for whom alone their report was intended. The final reports on each machine forwarded by Hunts to the seller, and tendered by the seller to the buyers as certificates under the contract of sale, were headed "Inspection report" and stated, *inter alia*, that the unit "was accepted as reconditioned to the required standards." The reconditioning of the machines was subsequently found to be unsatisfactory and the buyers claimed damages against the seller for breach of contract.

DEVLIN, J., said that there was a distinction between a certificate that was given only for the purposes of a particular contract and one that, although it might be called for by a particular contract, was not particularly related to it. The latter, which was addressed to all the world and carried the same meaning to all who read it, might be called a certificate *in rem*, and certified a standard of quality extraneous to the contract, while a certificate *in personam* concerned only a particular contract and might have to be interpreted in the light of particular contractual requirements or of information known only to the addressees. On the construction of the contract in the present case there were expressed or implied provisions (*a*) that the machinery would be fully reconditioned up to Hunt standards; (*b*) that a valid certificate by Hunts in the terms prescribed was conclusive that the machinery had been fully reconditioned up to that standard; and (*c*) an undertaking by the seller to supply such a certificate, and the type of certificate the parties were contemplating was a certificate *in rem*. Hunts did not certify *in rem* but *in personam* in relation to a particular contract and for the benefit of a particular customer who knew what his contract was, and, as a certificate under the contract of sale must contain a binding decision upon the quality of the machines and be unambiguous in its terms, the documents tendered as certificates were not certificates in compliance with the contract of sale. There had accordingly been a breach of contract. In deciding upon an appropriate standard to take for full reconditioning, the court must have regard to what the parties appeared to contemplate, and, therefore, where there was a recognised Hunt standard, that was the standard for the court to apply in assessing damages. Judgment for the plaintiffs.

APPEARANCES: *Sir Hartley Shawcross*, Q.C., *Eustace Roskill*, Q.C., *Michael Kerr* and *R. A. MacCrindle* (*Freshfields*); *Kenneth Diplock*, Q.C., *C. G. Armstrong Cowan* and *Gordon Hodgson* (*Booth & Blackwell*).

[Reported by Miss J. F. LAMB, Barrister-at-Law] [1 W.L.R. 963

SURVEY OF THE WEEK

HOUSE OF LORDS

PROGRESS OF BILLS

Read First Time:—

Long Leases (Scotland) Bill [H.C.] [23rd June.
Television Bill [H.C.] [23rd June.

Read Third Time:—

City of London (Various Powers) Bill [H.C.] [23rd June.

In Committee:—

Industrial and Provident Societies (Amendment) Bill [H.C.] [24th June.
Juries Bill [H.C.] [24th June.
Protection of Animals (Amendment) Bill [H.C.] [24th June.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read Second Time:—

Derbyshire County Council Bill [H.L.] [22nd June.
Dunoon Burgh Order Confirmation Bill [H.C.] [24th June.
London County Council (Holland House) Amendment Bill [H.L.] [21st June.
Ministers of the Crown (Fisheries) Bill [H.C.] [25th June.
Orpington Urban District Council Bill [H.L.] [21st June.

Read Third Time:—

Bradford Corporation (Trolley Vehicles) Provisional Order Bill [H.C.] [25th June.
London County Council (General Powers) Bill [H.L.] [21st June.
Newcastle upon Tyne Corporation Bill [H.L.] [21st June.
Pier and Harbour Provisional Order (Brighton) Bill [H.C.] [25th June.
Pier and Harbour Provisional Order (Cowes) Bill [H.C.] [25th June.
Pier and Harbour Provisional Order (Llanelly) Bill [H.C.] [25th June.
Pier and Harbour Provisional Order (Salcombe) Bill [H.C.] [25th June.
Pier and Harbour Provisional Order (Whitehaven) Bill [H.C.] [25th June.
Tees Conservancy Bill [H.L.] [23rd June.
Wolverhampton Corporation (Trolley Vehicles) Provisional Order Bill [H.C.] [25th June.

In Committee:—

Finance Bill [H.C.] [24th June.

B. QUESTIONS

LEGAL AID AND ADVICE (COUNTY COURTS)

The ATTORNEY-GENERAL said he was aware of the importance of the question of extending the operation of the Legal Aid and Advice Act to county court cases but he was not yet in a position to make a statement. [21st June.

INNKEEPERS LIABILITY (REPORT)

The ATTORNEY-GENERAL stated that the Government had not yet had an opportunity of considering the report on the reform of the law relating to the liability of innkeepers. [21st June.

INCOME TAX ACT, 1952 (APPLICATIONS UNDER S. 468)

Mr. R. A. BUTLER said that 878 applications for Treasury permission to move overseas had been received; of these, fourteen had been refused. [22nd June.

RENT INCREASES (NOTICES)

Mr. ERNEST MARPLES said that no additional powers were necessary to ensure that tenants were fully informed of their rights under the Rent Restriction Acts and under the Housing Repairs and Rents Bill, these being already given by s. 14 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. A popular booklet would be issued giving questions and answers which all landlords and tenants would clearly understand. [22nd June.

INCOME TAX (REPUBLIC OF IRELAND RESIDENCE)

Mr. BOYD-CARPENTER stated that, whilst income arising in the United Kingdom was generally subject to United Kingdom income tax wherever the resident resided, under a reciprocal agreement made in 1926 and given legal force by s. 23 of the Finance Act, 1926, a person resident in the Republic of Ireland and not also resident in the United Kingdom is exempt from United Kingdom income tax on such income. [24th June.

CONVICTION, STONY STRATFORD (APPEAL)

Asked why he had refused to advise the Queen to grant a free pardon to Maurice Edwin Ekins, who was convicted of permitting a person to ride his motor cycle whilst uninsured, an offence of

which he was subsequently shown to be not guilty, and in respect of which the Lord Chief Justice had said he regretted that in his opinion certiorari did not lie but he thought it was a proper case for submission to the Secretary of State, the HOME SECRETARY said it was contrary to practice to give reasons in such cases and he had, after consulting the Lord Chief Justice and making full inquiry, found no reason to modify his decision.

The Home Secretary circulated with the Official Report the following statement made by the Chairman of the Appeal Committee of the Buckinghamshire Quarter Sessions at the committee's meeting on 28th December, 1953 :—

" This appeal was heard by the committee on 31st August last. It was an appeal by Mr. Ekins against his conviction by the Stony Stratford Justices for having permitted a young man who was uninsured to ride his motor bicycle.

During the course of the hearing, Mr. Ekins produced two documents (a receipt and an I.O.U.) in support of his contention that he had sold the motor bicycle before the other young man rode it. It was suggested in cross-examination that those documents were not genuine, and publicity was given to the suggestion. The committee decided that, even assuming the documents to be genuine, they did not shake their view that there was no completed sale of the machine before the other young man rode it, and that the appellant's conduct otherwise amounted to ' permitting ' him to ride it. Accordingly they dismissed the appeal. At the same time they gave directions that the challenged documents should be sent to the Director of Public Prosecutions so that he might have further inquiries made to see whether they were genuine or not.

I thought I had made it clear at the time that we were not deciding that the documents were fraudulent but that they called for further inquiry. Through some misunderstanding publicity was given to the mistaken view that we had decided that the documents were fraudulent. The further inquiries made at the instance of the Director of Public Prosecutions established that they were not fraudulent, and in justice to Mr. Ekins (the appellant) publicity should now be given to the fact that any suggestion that he had been guilty of any offence in connection with these documents has been shown to be mistaken.

There is one other matter which ought to be cleared up. The only question submitted to the Director of Public Prosecutions was whether further inquiries about the challenged documents would show them to be genuine or not. Most unfortunately publicity was given to the Director's words that ' no criminal offence had been committed ' as if they referred to the appeal in the road traffic case. Of course his decision was not referring to the road traffic offence at all, but simply to the question of whether the documents were fraudulent, and on that point, as I have already said, he found that they were not fraudulent."

[24th June.

ACCUSED PERSONS (POLICE FORMS)

Asked whether he was aware that the Metropolitan Police practice of handing a small printed form to an accused person was an inadequate method of informing that person of his or her right to, and sometimes need of, legal aid, and what steps he would take to ensure that the information was more effectively given, Sir DAVID MAXWELL FYFE said he had no reason to think that the present arrangements were inadequate, but he would be glad to consider any information supplied. [24th June.

PRISONER, CHELMSFORD (DIVORCE PROCEEDINGS)

Asked why he had refused a prisoner permission to institute divorce proceedings, the HOME SECRETARY said prisoners were not ordinarily allowed to institute legal proceedings, though exceptions were sometimes made. The applicant in question had been refused permission to institute divorce proceedings during a previous sentence, had been at liberty for two years, and had done nothing about divorce proceedings until he was in prison again. [24th June.

CORONERS' INQUESTS

Asked whether he agreed that there might be a very real injustice to a man named in a verdict of a coroner's jury in which court the ordinary rules of procedure did not apply nor were there the normal rules of evidence designed to protect accused persons, the HOME SECRETARY said this was a very serious point and he would consider the matter but he could hold out no prospect of legislation at the moment.

[24th June.

APPROVAL OF DEVELOPMENT PLANS

The MINISTER OF HOUSING AND LOCAL GOVERNMENT stated that the following county development plans had been approved : Berkshire, Cardiganshire, Cheshire (Part), Durham, East Suffolk, Huntingdonshire, Isles of Scilly, Lincolnshire (Holland), Montgomeryshire, Radnorshire, Westmorland, West Sussex (Part I), and West Sussex (Part II).

In addition, the following county borough development plans had been approved : Barrow-in-Furness, Birkenhead, Blackburn, Bootle, Burnley, Burton-upon-Trent, Canterbury, Carlisle, Chester, Croydon, Darlington, Dewsbury, Gateshead, Gloucester, Huddersfield, Lincoln, Middlesbrough, Newcastle upon Tyne, Oldham, Preston, Rochdale, St. Helens, South Shields, Sunderland, Tynemouth, Wakefield, West Hartlepool, and Wigan.

[24th June.

STATUTORY INSTRUMENTS

Act of Sederunt (Admission of Solicitors), 1954. (S.I. 1954 No. 791 (S. 88).)

Bilston Corporation Water Order, 1954. (S.I. 1954 No. 809.) 6d.

Bristol Waterworks Order, 1954. (S.I. 1954 No. 795.) 5d.

Coast Protection (Rate of Interest) Regulations, 1954. (S.I. 1954 No. 802.)

Corn Returns (Scotland) Regulations, 1954. (S.I. 1954 No. 779 (S. 87).) 5d.

Dressmaking and Women's Light Clothing Wages Council (England and Wales) Wages Regulation (Amendment) Order, 1954. (S.I. 1954 No. 780.) 5d.

East Ham (Amendment of Local Enactment) Order, 1954. (S.I. 1954 No. 807.)

Education (Local Education Authorities) Grant Amending Regulations No. 1, 1954. (S.I. 1954 No. 814.)

Food Rationing (Amendment and Revocation) Order, 1954. (S.I. 1954 No. 797.)

Gravesend and Milton Waterworks Order, 1954. (S.I. 1954 No. 783.)

Grimsby, Cleethorpes and District Water Board (No. 2) Order, 1954. (S.I. 1954 No. 774.)

Heywood and Middleton Water (Chapel Lane) Order, 1954. (S.I. 1954 No. 816.) 5d.

Local Education Authorities Recoupment (Further Education) Regulations, 1954. (S.I. 1954 No. 815.) 5d.

London-Bristol Trunk Road (New Bridge, River Avon, Diversion) (Revocation) Order, 1954. (S.I. 1954 No. 773.)

Meat (Prices) (Amendment and Revocation) Order, 1954. (S.I. 1954 No. 823.)

National Health Service (Travelling Allowances, etc.) (Scotland) Amendment Regulations, 1954. (S.I. 1954 No. 806 (S. 89).)

National Service (Air Force) (Amendment) Regulations, 1954. (S.I. 1954 No. 805.) 5d.

Non-Contentious Probate Rules, 1954. (S.I. 1954 No. 796 (L. 6).) 1s. 2d.

These rules, which come into force on 1st October, 1954, revoke and replace with amendments the Non-Contentious Probate Rules of 1862 onwards. See p. 428, *ante*.

Perambulator and Invalid Carriage Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1954. (S.I. 1954 No. 781.) 5d.

Retail Bookselling and Stationery Trades Wages Council (Great Britain) Wages Regulation Order, 1954. (S.I. 1954 No. 792.) 8d.

Retail Furnishing and Allied Trades Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1954. (S.I. 1954 No. 793.) 5d.

Retail Newsagency, Tobacco and Confectionery Trades Wages Council (England and Wales) Wages Regulation (Amendment) Order, 1954. (S.I. 1954 No. 794.) 5d.

Retention of Cables, Pipes and Mains under Highways (Argyllshire) (No. 1) Order, 1954. (S.I. 1954 No. 803.)

Retention of Cables, Mains and Pipes under and over Highways (Lincolnshire-Parts of Lindsey) (No. 2) Order, 1954. (S.I. 1954 No. 789.)

Retention of Cable under Highway (Fifeshire) (No. 2) Order, 1954. (S.I. 1954 No. 804.)

Retention of Main under Highway (Kent) (No. 3) Order, 1954. (S.I. 1954 No. 790.)

Stopping up of Highways (Bristol) (No. 2) Order, 1954. (S.I. 1954 No. 787.)

Stopping up of Highways (London) (No. 27) Order, 1954. (S.I. 1954 No. 798.)

Stopping up of Highways (Oxfordshire) (No. 2) Order, 1954. (S.I. 1954 No. 788.)

Tottenham (Repeal and Amendment of Local Enactments) Order, 1954. (S.I. 1954 No. 808.)

Wakefield Water (Trunk Mains) Order, 1954. (S.I. 1954 No. 811.)

Wrexham and East Denbighshire Water (No. 2) Order, 1954. (S.I. 1954 No. 813.) 5d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 102–103 Fetter Lane, E.C.4. The price in each case, unless otherwise stated, is 4d., post free.]

POINTS IN PRACTICE

Exempt Private Company—Loss of Exemption

Q. (1) A company incorporated under the Companies Act, 1948, as an exempt private company lost its exemption by reason of shares of that company having been held in the name of a nominee. How does a private company which has so lost its exemption regain its status as an exempt private company? (2) Are loans made to a director whilst the company was an exempt private company repayable by the director to the company when the company has lost its exemption? (3) The said company having applied some of its funds in purchasing its own shares, the directors of the company are liable for misapplication of the company's funds to *ultra vires* purposes. Are any steps open to a dissatisfied shareholder to bring the matter before the court or to have the company wound up?

A. (1) When the position has been corrected and the relevant conditions are again satisfied, application should be made to the Board of Trade, Insurance and Companies Department, Lacon House, Theobald's Road, London, W.C.1. The application should be made on Form E.P.C.1, copies of which can be obtained on application to the above address, and should be accompanied by a covering letter signed by or on behalf of all the directors. (2) In our opinion the director is not thereby required to repay a loan made to him, but it is the duty of the company to secure repayment as soon as possible. If the loan is repayable on demand or a fixed period after demand, the company should therefore make the necessary demand. If it is a fixed-term loan, nothing can be or has to be done until the term of the loan expires. (3) An action to compel repayment can certainly be commenced. If necessary, e.g., in a case where the persons against whom relief is sought themselves control the company, some of the shareholders (one, if necessary) can sue "on behalf of themselves and all other the shareholders of the company other than the defendants"; in such a case the company should be made a defendant. See *Burland* v. *Earle* [1902] A.C., at p. 93. Purely on the facts given we doubt if a petition to wind up the company would succeed.

Estate Duty—Gift Inter Vivos—Purchase of House with Cash Provided by Deceased—Whether Gift of House or Cash

Q. A married man has just died, having within five years of his death provided the purchase-money for a house purchased in his wife's name. The deceased took no part in the purchase transaction, the contract for which was made by his wife alone, but the cash for such transaction was provided by the deceased, although it did not pass through the wife's hands. It appears that liability for estate duty arises, but the question is whether the gift is the cash provided by the deceased or the house itself. In the latter case, the amount chargeable to duty would appear to depend on the value of the house at the deceased's death, for which the benefit of the "Chancellor's concession" would also be claimed. Do you consider the assessment for estate duty should be based on the amount of cash provided, or on the value of the house? If, in the circumstances outlined above, the cash provided is the amount to be charged to duty, are any other circumstances possible in which the duty would be assessed on the value of the house?

A. Whether a gift is of a house or of cash is always a difficult matter upon which there is a paucity of authority. It appears to us that the only available test is the nature of the property given at the moment when dominion is passed from donor to donee. Compare *Timpson's Executors* v. *Yerbury* [1936] 1 K.B. 645 with *Carter* v. *Sharon* (1936), 80 Sol. J. 511. The matter was discussed at 96 Sol. J. 303. In this case it seems to us that it can be argued that this is a gift of a house and not of cash because the money never passed into the wife's hands and she never had dominion over it in the sense that she might, if she had chosen, have devoted it to something else. The point is a very nice one. Compare Hanson, 9th ed., p. 80, with Green, 3rd ed., p. 88, on a similar matter. We should imagine that the Crown may be disposed to contend for cash in view of the "Chancellor's concession," but we think a determined fight ought to carry the day.

Trust—Income Less Tax Paid to Mother on Behalf of Children—Payment to Mother of Tax Recovered

Q. We represent trustees who have a discretion to pay income to infant grandchildren as they think fit. They have accordingly paid such income less tax to the mother on behalf of three grandchildren, and have recovered tax in respect of each child separately. The point has now been taken that the tax recovered cannot be paid to the mother on behalf of each child, but must be retained by the trustees and paid to each child on attaining its majority; also, that if the tax recovered is paid to the mother on behalf of the child, and added to what she has already received on behalf of the child from the trust, the total exceeds £85, and the mother will lose the child's allowance. Are the above contentions correct, and if so, can the trustees pay the whole or up to one-half of the tax recovered to the mother as an advance under s. 32 of the Trustee Act, 1925?

A. The trustees have a certain amount of income coming in each year in respect of each child. The whole gross amount of such income is available for the child, who must, of course, pay income tax on it to the extent that he is liable to such tax. The fact that the income is paid to the trustees after deduction of tax makes it necessary to claim a repayment where it is appropriate, but this is a matter of collection and does not affect the basic rights of the parties. The trustees may, at their discretion, pay all or none or any intermediate amount of the available income to the mother. So far they have chosen to pay her eleven-twentieths of that income: we are unable to see why they should be forbidden to increase that proportion to twenty-twentieths because they have got the odd nine-twentieths from the Crown instead of direct from the source of the income as would have been the case if it had not been paid under deduction. We agree that they should take care that the child's income does not exceed £85 or, as stated, the child's parent or guardian will lose the child relief on his or her own tax.

Hire-Purchase of Unroadworthy Car

Q. *P* went to a garage and purchased a car. The usual hire-purchase form was filled up by him and he gave a cheque in favour of the garage for the usual deposit. Immediately after he had taken away the car it was obvious that it was not roadworthy and not in accordance with the representation which had been made about it. The car was returned and the cheque was stopped. The car was later inspected by an engineer from the Automobile Association, and following this inspection the purchaser declined to take away the car, and in fact proposed to rescind his contract and refused to honour his cheque. According to the hire-purchase agreement the car was bought by the finance corporation and there is no contract between

Questions, which can only be accepted from practising solicitors who are subscribers either directly or through a newsagent, should be addressed to the "Points in Practice" Department, The Solicitors' Journal, 102-103 Fetter Lane, London, E.C.4.

They should be **brief, typewritten in duplicate,** and accompanied by the name and address of the sender **on a separate sheet,** together with a **stamped addressed envelope.** Responsibility cannot be accepted for the return of documents submitted, and no undertaking can be given to reply by any particular date or at all.

the garage and the hirer. Can the garage sue on a dishonoured cheque and is it possible for the hirer to avoid his contract for hire? Could the transaction be considered a conspiracy between the finance corporation and the garage?

A. The question is not very detailed as to the vital transaction when the car was chosen and the cheque changed hands, and there is certainly not a shred of evidence in the question of any conspiracy. A conspiracy is an agreement to do something tortious or illegal, or to do something by unlawful means. What does the purchaser know of the terms of any agreement or arrangement or combination between the finance corporation and the garage? No doubt the garage personnel were the agents of the finance corporation for the purpose of the loan. However, there must have been a sale by the garage if the finance corporation is described as owning the car, and that sale may have been illegal. *Vinall* v. *Howard* [1954] 2 W.L.R. 314; *ante*, p. 143, indicates that this would result if the unroadworthiness were a matter of construction and equipment; the case decides that there is no illegality if there is merely neglect of proper maintenance. Apart from this question of illegality, the condition of the car is at the risk of the buyer (*caveat emptor*), subject to the effect of any representation which may have been made to him. If a material misrepresentation can be proved, *P*, having acted promptly, can rescind his contract (whether of hire or purchase) and stop his cheque, defending any action on grounds of total failure of consideration. If the misrepresentation was fraudulent, he is entitled to damages in addition.

NOTES AND NEWS

Honours and Appointments

The Queen has been pleased to approve the appointment of Lt.-Col. J. G. S. HOBSON, O.B.E., T.D. (T.A.R.O.), to be Chairman of the Court of Quarter Sessions for the County of Rutland.

The Queen has approved the appointment of Mr. A. J. N. PATERSON to be registrar of the Privy Council from 1st August, on the retirement of Lt.-Col. J. Dallas Waters.

Mr. R. N. HUTCHINS has been appointed solicitor to the Derbyshire County Council.

Mr. E. C. PRYCE, O.B.E., solicitor, of St. Mary Axe, London, E.C.3, has been elected a Sheriff of the City of London, to take office at Michaelmas.

Mr. A. T. WYLIE, senior assistant solicitor to Wakefield Borough Council, has been appointed deputy town clerk in succession to Mr. C. J. Clayton, who is to retire in August.

Miscellaneous

CROYDON DEVELOPMENT PLAN APPROVED

The Minister of Housing and Local Government has approved with modifications the development plan for the County Borough of Croydon.

The plan, as approved, will be deposited in the council offices for inspection by the public.

LINCOLNSHIRE (Parts of Kesteven) DEVELOPMENT PLAN APPROVED

The Minister of Housing and Local Government has approved with modifications the development plan for the County of Lincolnshire (Parts of Kesteven).

The plan, as approved, will be deposited in the County Offices, Sleaford, for inspection by the public.

GREAT YARMOUTH DEVELOPMENT PLAN APPROVED

The Minister of Housing and Local Government has approved with modifications the development plan for the County Borough of Great Yarmouth.

The plan, as approved, will be deposited in the council offices for inspection by the public.

A public inquiry will be held in the Council Chamber, Town Hall, Glossop, opening on Thursday, 29th July, at 10.30 a.m., about the route of the Pennine Way between Laddow Rocks and Black Hill, in the Rural District of Tintwistle, in the Peak District National Park.

ROYAL COMMISSION ON THE TAXATION OF PROFITS AND INCOME

A further meeting in the present series of public hearings of evidence by the Royal Commission on the Taxation of Profits and Income will be held at 10 Carlton House Terrace, on Thursday, 8th July, at 10.30 a.m. The witnesses will be: Churches Main Committee; Board of Inland Revenue.

SOCIETIES

INNER TEMPLE

The Treasurer (Sir Charles Doughty, Q.C.) and Masters of the Bench entertained the following guests at dinner at the Inner Temple on the 24th June, the Grand Day of Trinity Term: the Earl of Selkirk, Lord Swinfen, Lord Baillieu, the Attorney-General, the Deputy Treasurer of Gray's Inn (Mr. Justice Hilbery), the Chief Justice of Trinidad and Tobago, Sir Edward Wilshaw, Sir Horace Evans, Brigadier Sir Norman Gwatkin, Sir Will Spens, Sir Edward de Stein, Sir Fred Pritchard, Lieutenant-Colonel Geoffrey Hoare, Mr. Bernard Westall, Mr. Richard O'Sullivan, Q.C., Mr. C. G. Randolph, Mr. Frederick Cumber, and the Sub-Treasurer.

The annual dinner of the INCORPORATED LAW SOCIETY OF MERTHYR AND ABERDARE was held on 22nd June at Aberdare. The guests included Mr. Justice Glyn-Jones, His Honour Judge Gerwyn Thomas and Mr. W. C. Crocker, the President of The Law Society.

The SOLICITORS' ARTICLED CLERKS' SOCIETY announce the following programme: Tuesday, 13th July: Scottish Reels; The Law Society's Hall, 6 p.m.; refreshments provided; members 1s., non-members 1s. 6d.—Thursday, 29th July: The debating society will hold two informal moots "That the following cases were wrongfully decided—(1) *Pharmaceutical Society of Gt. Britain* v. *Boots* [1952] 2 All E.R. 456 (Contract and Acceptance); (2) *Candler* v. *Crane Christmas & Co.* [1951] 1 All E.R. 426 (Negligence)." The chairman will be Mr. M. Greene, and the moot will be held at The Law Society's Hall, commencing at 7 p.m.; refreshments available 6–7 p.m.—Wednesday, 11th August: Cricket match against the Chartered Accountants' Students' Society of London. Those interested in playing, please write to Mr. M. Coles at the Society's address.

PRACTICE NOTE

Colonial Probates Acts, 1892 and 1927

The Non-Contentious Probate Rules, 1954, which come into force on 1st October, 1954, provide (*inter alia*) that applications for resealing under the Colonial Probates Acts, 1892 and 1927, need not normally be advertised.

The Registrars of the Principal Probate Registry are prepared to consider favourably applications to dispense with advertisement during the period before the new rules come into force.

D. A. NEWTON, Secretary,
21*st June*, 1954. Principal Probate Registry.

"THE SOLICITORS' JOURNAL"

Editorial, Publishing and Advertising Offices: 102–103 Fetter Lane, London, E.C.4. Telephone: CHAncery 6855.

Annual Subscription: Inland £3 15s., Overseas £4 5s. (payable yearly, half-yearly or quarterly in advance).

Advertisements must be received first post Wednesday.

Contributions are cordially invited and should be accompanied by the name and address of the author (not necessarily for publication).